IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 639

LAKE CHARLES STEVEDORES, INC., ET AL.,
Petitioners,

versus

LINCOLN RICHARD,
Respondent.

LAKE CHARLES STEVEDORES, INC., ET AL.,
Petitioners,

versus

FRED SULLIVAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA.

JOHN A. HICKMAN

INDEX

	Page
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	3
QUESTION PRESENTED	5
STATUTES INVOLVED	6
STATEMENT	7
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	15
Appendix A—Opinion of the Court of Appeal, First Circuit, State of Louisiana, in case of Richard v. Lake Charles Stevedores, Inc., et al.	16
B—Opinion of the Supreme Court of Louisiana holding appellate judgment correct and refusing application for writs of certiorari in case of Richard v. Lake Charles Stevedores, Inc., et al.	25
C—Opinion of Court of Appeal, First Circuit, State of Louisiana, in the case of Sullivan v. Lake Charles Stevedores, Inc., et al.	27
D—Opinion of the Supreme Court of Louisiana holding appellate judgment correct and refusing application for writs of certiorari in the case of Sullivan v. Lake Charles Stevedores, Inc., et al.	28

CITATIONS

Cases:	Page
American Railway Express Co. v. Levee, 263 U. S. 19, 44 S. Ct. 11	2, 3
Baskin v. Industrial Acc. Comm., 338 U. S. 854, 70 S. Ct. 99	9
Bethlehem Steel Co. v. Moore, 335 U. S. 874, 69 S. Ct. 239	9
Davis v. Department of Labor and Industry, 317 U. S. 249, 63 S. Ct. 225	8
Kaiser Co., Inc., v. Baskin, 340 U. S. 886, 71 S. Ct. 208	10
Magnolia Petroleum Company v. Sullivan H. Hunt, 319 U. S. 734, 63 S. Ct. 1031	2, 3
Minnie v. Port Huron Terminal Company, 55 S. Ct. 884, 295 U. S. 647	6, 8, 10, 11
New York Central R. Co. v. Winfield, 244 U. S. 147, 37 S. Ct. 546	6, 8
Parker v. Motor Boat Sales, 314 U. S. 244, 62 S. Ct. 221	12
Pennsylvania Railroad Co. v. O'Rourke, 344 U. S. 334, 73 S. Ct. 302	8
Pope v. Atlantic Coastline R. Co., 345 U. S. 379, 73 S. Ct. 749	4
Radio Station WOW v. Johnson, 326 U. S. 120, 65 S. Ct. 1475	4
T. Smith & Son v. Taylor, 276 U. S. 179, 48 S. Ct. 228	6, 8, 9, 10, 15
United States v. General Motors Corporation, 323 U. S. 373, 377, 65 S. Ct. 357	4

Page

Statutes:

Title 28, U. S. C., Section 1257 (3) 3

Title 33, U. S. C. A., Paragraph 901 3, 4

Title 33, U. S. C. A., Paragraph 903 5

Title 33, U. S. C. A., Paragraph 905 5

Title 33, U. S. C. A., Paragraph 939 5, 7

Constitution of the United States, Section 2 of Article 3 5

West's Louisiana Revised Statutes:

23:1021 6

23:1032 6

23:1035 6

Miscellaneous:

Excerpts from Report of Senate Committee on the Judiciary which accompanied Longshoremen and Harbor Worker's Statute (Footnote 8) 12, 13

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA.

Petitioners pray that a writ of certiorari issue to review judgments of the Court of Appeal, First Circuit,

State of Louisiana, entered in each of the above entitled cases on June 4, 1957.[1]

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court in the Richard case (Richard R. 17-29) is unreported. The opinion of the Court of Appeal, First Circuit, State of Louisiana (Richard R. 32-40) is reported in 95 Southern Reporter (2d) 830, and for convenience is printed in Appendix "A" hereto, *infra*, page 16, *et seq.* The opinion of the Supreme Court of Louisiana refusing writs of review on the basis that the Appellate Court judgment was "*correct*", is unreported but is appended to the record and for convenience printed in Appendix "B" hereto, *infra*, page 25.

The opinion of the District Court in the Sullivan case (Sullivan R. 16-18) is unreported. The opinion of the Court of Appeal, First Circuit, State of Louisiana (Sullivan R. 21) is reported in 95 So. (2d) 835, and for con-

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[1] Although refusal of the Supreme Court of Louisiana to grant petitioners' application for writs of review, and affirming the decision of the Court of Appeal with the statement **"Writ refused. Judgment correct."**, would indicate that the petition should be directed to that court, petitioners are persuaded to follow the procedure previously accepted by this court in an antecedent Louisiana case of **Magnolia Petroleum Co. v. Sullivan H. Hunt**, 319 U. S. 734, 63 S. Ct. 1031, and in **American Railway Express Company v. Levee**, 263 U. S. 19, 44 S. Ct. 11. Moreover, Article 7, Sections 10 and 29 of the present Louisiana Constitution (1921) gives exclusive appellate jurisdiction to the Court of Appeal in all cases arising under the Louisiana Compensation Statute, subject to the right of the Supreme Court of Louisiana (the highest court of the state) by virtue of Section 11 of said Article 7 to require, by writ of certiorari or review, that a case be certified to it by the Court of Appeal for review, provided such application be timely made. Such procedure was timely followed, as shown by the Jurisdictional statement, **infra.**

venience is printed in Appendix "C", *infra*, page 27. The opinion of the Supreme Court of Louisiana refusing writs of review on the basis that the Appellate Court judgment was correct, is unreported but is appended to the record and for convenience is printed in Appendix "D", *infra*, page 28.

JURISDICTION.

The judgment of the Court of Appeal in each case was entered on June 4, 1957, (see 95 Southern Reporter (2d) 830). A petition for rehearing, timely filed by petitioners, was denied in each case on June 28, 1957, (Richard R. 50; Sullivan R. 31). Application to the Supreme Court of Louisiana for writs of review and certiorari were timely filed on July 17, 1957, and in each case refused on October 8, 1957. Thus the decisions of the Court of Appeal, First Circuit, State of Louisiana held, in each case, to be "*correct*" by the Supreme Court of Louisiana in denying review on certiorari are decisions by the highest court of the State in which a decision could be had, and the writs of certiorari herein prayed for may be properly directed to the Court of Appeal, First Circuit, State of Louisiana. *Magnolia Petroleum Co. v. Sullivan H. Hunt*, and *American Railway Express Co. v. Levee, supra*, Note 1.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Sec. 1257 (3) on the grounds that not only has the validity and applicability of a Federal Statute in a field of pre-eminent federal jurisdiction *(Longshoremen and Harbor Worker's Act*, Title 33 U.S.C.A., Par. 901, *et seq.)* been drawn into question, but that the decisions of the Louisiana Courts have finally decided a Federal question of substance in a way not in accord with applicable decisions of this Court.

It is recognized that ordinarily this Court will not review an interlocutory decision of a State Court, but that rule of practice has been deemed by this Court to have no application where, as here, petitioners' case comes to the Court upon a controlling Federal question, the determination of which, leaves "nothing more to be decided".[2] *Pope v. Atlantic Coastline R. Co.*, 345 U. S. 379, 73 S. Ct. 749.

Moreover, the State Courts' decisions in refusing to recognize exclusive Federal jurisdiction in the Secretary of Labor of the United States, who is alone charged with administration of the Federal Statute which governs compensation for injuries to longshoremen injured in the course of employment aboard vessels afloat navigable waters represents such a *final adjudication of the sole Federal issue* that nothing remains to the cases in their present posture which could even remotely give rise to a Federal question. *Radio Station WOW v. Johnson*, 326 U. S. 120, 65 S. Ct. 1475.

Lastly, the rulings of the Louisiana Courts involve "an issue fundamental to the further conduct of the case • • •"; *United States v. General Motors Corporation*, 323 U. S. 373, 377, 65 S. Ct. 357, and should be reviewed at

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[2] Petitioners explicitly concede that respondents were injured in the course of their employment as longshoremen aboard a vessel afloat navigable waters so as to entitle them to benefits for their disability. The sole defense to their claims is based on the contention that the Louisiana Statute could not be applied as a measure of their compensation by reason of the exclusive and controlling nature of the Longshoremen and Harbor Worker's Act, Tit. 33 U. S. C. A., Par. 901, et seq. The holding of the Louisiana Courts in this instance leaves nothing more to be decided than the statutory quantum or "accounting" that respondents should receive under the provisions of the State Statute.

this stage because they present insuperable objection to the maintenance of the suits in point of jurisdiction.[3]

QUESTION PRESENTED.

The sole and quite narrow question presented is whether the Louisiana Workmen's Compensation Statute can be applied to a case of injury to an admitted *longshoreman* who was injured in the course of maritime employment aboard a vessel afloat *navigable waters* of the United States in view of the exclusionary nature of the Longshoremen and Harbor Worker's Act, Tit. 33, U.S.C.A., enacted pursuant Section 2 of Article 3 of the Constitution of the United States, which extends the judicial power of the United States *"to all cases of admiralty and maritime jurisdiction"*.

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[3] Section three of the Act as to "COVERAGE" provides:

Par. 903 of Tit. 33, U. S. C. A., "Compensation shall be payable under this Chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring on the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Par. 905 of the Federal Statute provides in part that: "The liability of an employer prescribed in Sec. 904 of this Chapter shall be **exclusive and in place of all other liability of such employer to the employee** * * *".

Par. 939 of the Federal Statute provides in part: "(a) except as otherwise specifically provided, the Secretary of Labor shall administer the provisions of this Chapter."

The decisions of the Louisiana Courts are **final** in denying (a) petitioner's **sole defense** of exclusive application of the Federal Statute and (b) petitioners' objection to the maintenance of the suit in point of **State jurisdiction** and thus squarely involve an issue fundamental to the further conduct of the case.

STATUTES INVOLVED.

Respondent's suits were framed under the provisions of the *Louisiana Workmen's Compensation Statute* (West's La. R. S. 23:1021, *et seq.*),[1] which constitutes the legal remedy afforded by the law of Louisiana to employees against their employers and insurers for injury and disability incurred in the course of certain hazardous occupations of the employer.

This Statute defines as hazardous businesses and occupations among others, the "* * * loading or unloading of cargoes of vessels * * *."[2] As aforesaid, the

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[1] 23:1032 thereof provides:

"The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations.

"Nothing in this Chapter shall affect the liability of the employer to a fine or penalty under any other statute."

[2] West's La. Rev. St. 23:1035 in pertinent part provides:

"The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses and occupations:

"* * * loading or unloading of cargoes of vessels * * *".

No claim is made here by petitioners that the State Statute may not validly be applied to cases of "land" injury. **T. Smith & Son v. Taylor, infra,** but it is contended that attempted application of the Statute to injuries occurring on navigable water violates Section 2 of Article 3 of the Constitution. **Minnie v. Port Huron Terminal Co., infra,** and disregards the established doctrine that "* * * when Congress acts upon the subject all State laws covering the same field are **necessarily superseded** by reason of the supremacy of the national authority." **New York Central R. Co. v. Winfield,** 244 U. S. 147; 37 S. Ct. 546.

Longshoremen and Harbor Worker's Act adopted by the Congress of the United States, purports to provide the exclusive method, manner and jurisdiction of providing compensation benefits to longshoremen injured upon navigable waters of the United States. Administration of the act is exclusively vested in the Secretary of Labor and or his designated deputies by virtue of Par. 939 of Federal Tit. 33, U.S.C.A.

STATEMENT.

Respondents filed their State Court actions, each particularly alleging, and later stipulating, that their injuries occurred while performing the work of longshoremen aboard vessels in excess of eighteen tons net burden, while the same were afloat navigable waters of the United States.[6]

To the suits thus framed, petitioners filed exceptions of (a) no cause of action (equivalent to general demurrer); (b) no right of action; and (c) to the jurisdiction of the court *rationae materiae* (R. 8-13 in both cases), *all predicated upon and raising the sole Federal question* here involved; *i. e.*, exclusive jurisdiction of the Secretary of Labor of the United States to provide the compensation remedy for admitted injury of respondents pursuant the provisions of the Federal Statute. Indeed, there are no other questions involved in these cases, inasmuch as petitioners freely and explicitly concede that respondents are entitled to compensation for their injuries, but main-

[6] In the **Richard** case the particular allegations appear at p. 3 of the record and the stipulation at pp. 15-16 of the record.

In the **Sullivan** case the particular allegations appear at p. 3 of the record, and the stipulation at pp. 14-15 of the record.

tain that an award or "accounting" therefor cannot validly or constitutionally be made pursuant the State Statute.

In due course the exceptions were tried and maintained by the District Court on the *basis that the Federal Statute was controlling* (R. 17 both cases) and judgment was thereupon entered in favor of petitioners; on appeal, the Court of Appeal, First Circuit, State of Louisiana, reversed, holding that respondents had an "election" to pursue their remedies under either the State or Federal Statute, and that having elected to seek their remedy under the Louisiana Statute that their actions were maintainable in the *State jurisdiction* and under the *provisions of the State Statute* (R. 32-33); petitioners' application for writs of certiorari and review to the Supreme Court of Louisiana were peremptorily refused with the statement "judgment correct".

REASONS FOR GRANTING THE WRITS.

1. The decisions of the Court of Appeal, First Circuit, State of Louisiana, and the Supreme Court of Louisiana, are directly and irreconcilably in conflict with the decisions of this Court in *Minnie v. Port Huron Terminal Company*, 55 S. Ct. 884, 295 U. S. 647; and *T. Smith & Son v. Taylor*, 276 U. S. 179, 48 S. Ct. 228.

Moreover, the decisions of the Louisiana courts infringe upon and directly question the clear pronouncements of this Court in *Penn. RR. Co. v. O'Rourke*, 344 U. S. 334, 73 S. Ct. 302; *Davis v. Department of Labor and Industry, 317 U. S. 249, 63 S. Ct. 225;* and *New York Central R. Co. v. Winfield*, 244 U. S. 147, 37 S. Ct. 546.

In the *Minnie* case, which involved a *precisely identical* factual and legal situation as here presented, *i. e.*, (1) a plaintiff occupying the status of a longshoreman performing maritime services; (2) who was injured in the course of employment while aboard a vessel afloat navigable waters; and (3) who was seeking a recovery for his disability under a State Compensation Statute, this Court specifically held that "* * * the case of an employee injured upon navigable waters while engaged in maritime service, is governed by the maritime law". This Court held that the State Statute *could not be applied.*

In a corollary case involving the inverse of the proposition, this Court held in *T. Smith & Son* (a case emanating from Louisiana) that:

> "Deceased was *engaged in maritime work under a maritime contract.* If the cause of action *arose upon the river*, the rights of the parties *are controlled by maritime law*, the case is within the admiralty and maritime jurisdiction, and the *application of the Louisiana Compensation Law violated Section 2 of Article 3.* But, if the cause of action arose upon the land, the state law is applicable." (Emphasis by petitioners).

The decisions of the Louisiana Courts in this instance are squarely predicated on the belief that the *Davis* case, and the later pronouncements of this Court in *Bethlehem Steel Co. v. Moore*, 335 U. S. 874, 69 S. Ct. 239; *Baskin v. Industrial Acc. Comm.*, 338 U. S. 854, 70 S. Ct.

99; and *Kaiser Co., Inc., v. Baskin*, 340 U. S. 886, 71 S. Ct. 208,[7] overruled or modified the former decisions of the Court in *Minnie* and *T. Smith & Son* cases. This concept appears to be clearly in error in view of the concise and cogent language with which Mr. Justice Black commenced his opinion in the *Davis* case (P. 227 of 65 S. Ct.):

> "Harbor workers and longshoremen employed 'in whole or in part, upon the navigable waters' *are clearly protected by this Federal Act;* but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." (Emphasis by petitioners).

The pivotal essence of this Court's holding in *Davis* is unmistakably shown in the language employed at Page 229 of 65 S. Ct. Rep., as follows:

> "Both of these laws (the Longshoremen Act and the State Compensation Statute of the State of Washington) show clearly that *neither was intended to encroach on the field occupied by the other.* But the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side." (Emphasis by petitioners).

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[7] In which this Court permitted application of State Workmen's Compensation Statutes to injuries involving variously "materialmen", "iron workers"; "riggers" and "structural steel workers"—obviously classes of employees and employment of such **marginal nature** as would give rise to a reasonable question of overlapping Federal and State remedies.

The *Davis* case dealt with a structural steel worker who was drowned while working to dismantle an abandoned drawbridge which spanned the river. Neither *Davis* nor *Moore's* case nor *Baskin* dealt with longshoremen *per se*, admittedly performing essentially maritime service, but rather they dealt with a type of employee and employment not strictly maritime in nature, about which some question could arise in view of the *marginal nature of employment* and which, by reason of particular facts and nature of employment, might well fall with equal logic under the coverage of either the Federal or State Statute. This marginal nature of employment based upon particular facts led this Court to enunciate in the *Davis* case the now renowned "*twilight zone doctrine*".

The instant case by comparison is "open day-light" involving, as it does, injury to longshoremen engaged in maritime work aboard navigable waters who are, in the very language of the *Davis* case, "* * * *clearly protected by this Federal Act* * * *".

Parenthetically we observe that the fact that this Court did not expressly or by implication overrule, modify or negate its previous decisions in the *Minnie* and *T. Smith & Son* cases by its pronouncements in *Davis*, is made evident from Note (3) of the *Davis* case (P. 228 of 63 S. Ct. Rep.) wherein this Court concisely observed:

> "* * * A question *not mentioned above* which has been considered in several cases is that of the jurisdiction to which it is to be assigned accidents affecting persons loading boats while on the wharf; *accidents affecting persons loading vessels while on the vessel;* accidents affecting persons standing on

either the vessel or the wharf who are knocked into the water. Smith & Son v. Taylor, 276 U. S. 179, 48 S. Ct. 228, 72 L. Ed. 520; Vancouver S. S. v. Rice, 288 U. S. 445, 43 S. Ct. 420, 77 L. Ed. 885; Minnie v. Port Huron Terminal, 295 U. S. 647, 55 S. Ct. 884, 79 L. Ed. 1631." (Emphasis by petitioners).

The Federal Statute was clearly intended by Congress to be truly exclusive in its scope and application.

That it was the intent of Congress to make the Longshoremen and Harbor Worker's Act truly exclusive in cases of injury to longshoremen on navigable waters of the United States by pre-empting the field of such legislation and thereby excluding application of any State Workmen's Compensation Statutes is cogently spelled out in the report of the Senate Committee on the Judiciary which accompanied the Federal Bill and which, as pertinent here, was set forth and adopted by this Court in the case of *Parker v. Motor Boat Sales*, 314 U. S. 244, 62 S. Ct. 221.[8]

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[8] "**If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation**; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation **cannot**, constitutionally, be enacted that **will apply State laws to this occupation**. (Southern Pacific Co. v. Jensen, 244 U. S. 205 (37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451 Ann. Cas. 1917E, 900); Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145); Washington v. W. C. Dawson & Co., 264 U. S. 219 (44 S. Ct. 302, 68 L. Ed. 646).

* * * * * *

"There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the

(Continued on Page 13)

2. Manifestly the question presented is of vital importance involving as it does a Federal question of substance that has been decided by the Louisiana courts in a way not in accord with precisely similar and applicable decisions of this Court. In holding to be "correct" the decision of the appellate court, the Louisiana Supreme Court has peremptorily decided that the State Statute may be applied in a field of pre-eminent Federal jurisdiction denied to it by the very language of Section 2 of Article 3 of the Constitution.

The very real results flowing from the State Courts' decisions will be to actually deprive the Federal Compensation Commissioner of *jurisdiction* in cases where the Congress has ordained that his authority shall exclusively apply. Necessarily these decisions will work material prejudice to both the uniformity and the uniform application intended by Congress to be given the Federal Statute in the field of compensation afforded *maritime workers* injured in the course of their employment on *navigable waters*—a field which this Court has time and again held could not

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8 (Continued from Page 12)

> specific decisions referred to placed beyond the reach of the states. The proviso permitting recovery only where compensation 'may not validly be provided by State law' **cannot be read in a manner that would defeat this purpose.**
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> * * * * * * *
>
> "The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress: **the field in which a state must not validly provide for compensation** may be taken, for the purposes of the Act, as the same **field which the Jensen line of decision excluded from state compensation laws.**" (Emphasis by petitioners.)

validly be reached by the effect of State Workmen's Compensation Statutes.

In enacting the Longshoremen and Harbor Worker's Act Congress placed the administration thereof solely under the Secretary of Labor and his authorized deputy commissioners and sought to provide, *in accordance with previous mandates of this Court*, a uniform schedule of benefits for longshoremen injured on navigable waters that would be identically and uniformly applied throughout all the maritime states. Its equal geographical application met the test of "uniformity" found by this Court to be so essential to the validity of legislation in this paramount federal field.

On the other hand, we can conceive of no greater disruption to the uniformity and equal application of the general maritime law than would be present in the situation where longshoremen could "elect"[9] to seek their remedies for injuries occurring on navigable waters under either the Federal Statute (which the Congress said would be exclusive) or under the *varying and differing provisions* of the multitude of State Compensation Statutes of the many seaboard and maritime states of the union.

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[9] Louisiana is a foremost maritime State and since these decisions of the Court of Appeal, First Circuit, State of Louisiana, have been published (and writs of review refused by the Supreme Court of Louisiana on the basis that the appellate judgments were correct) many identical cases involving longshoremen injured on navigable waters have been instituted in this judicial district alone, seeking remedy solely under the Louisiana Statute and thus imposing upon petitioners, as well as others similarly situated, the harassment of immediately defending and litigating a multitude of cases which hithertofore had universally been conceded to fall exclusively within the jurisdiction of the Secretary of Labor and/or his authorized deputy commissioners.

The decisions of the Louisiana Courts cannot be temporized. They clearly hamper, impede and interfere with the orderly administration of a Federal Statute in a field of pre-eminent Federal jurisdiction.

3. The decisions in this instance are the *only reported cases* that we have been able to find in the jurisprudence of the United States where a longshoreman injured on navigable waters was permitted to recover under a State Workmen's Compensation Statute in the face of the authority and jurisdiction of the Congress in a field in which the exclusive and paramount power of the United States exists by virtue of Section 2 of Article 3 of the Constitution as held by this Court in numerous cases of which *Smith & Son v. Taylor* and *Minnie v. Port Huron Terminal*, *supra*, are but illustrative.

CONCLUSION.

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

LINCOLN RICHARD,
Plaintiff-Appellant,

vs.

LAKE CHARLES STEVEDORES, INC., ET AL.,
Defendants-Appellees.

Appeal from the Fourteenth Judicial District Court,
Parish of Calcasieu, Hon. John T. Hood, Jr.,
District Judge, Presiding.

TATE, Judge.

This suit for workmen's compensation was dismissed upon an exception of no cause of action.[1] Defendants are the injured workingman's employer and its compensation insurer.

The allegations of the petition show that plaintiff was injured in the course of his employment as a "longshoreman", "while working in the hold of the vessel, S. S. SEAGATE, which was moored to the dock in the Lake Charles harbor."

[1] Although denoted as an exception of no right and no cause of action.

Upon these allegations that the plaintiff was a longshoreman injured while working upon the navigable waters of the United States, the District Court dismissed plaintiff's suit upon the ground that the federal government, with exclusive constitutional jurisdiction over maritime law and maritime injuries, has provided the exclusive remedy for longshoremen by the federal "Longshoremen's and Harbor Workers' Compensation Act", 33 USCA, Par. 901, et seq., especially 33 USCA, Par. 905. See jurisprudence following Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524 (1917) such as Rhinehart v. T. Smith & Son, La. App. Orl., 14 So. 2d 287.

Conceding that at one time these authorities would have governed in the present situation, plaintiff-appellant earnestly urges that by Davis v. Department of Labor, 317 U. S. 249, 63 S. Ct. 225 (1942) and the succeeding jurisprudence, the United States Supreme Court has decisively re-established the rule that employees injured in connection with maritime work are not barred by the federal Constitution from remedies provided for them by the State legislatures, in the absence of material prejudice to any feature of the general admiralty law.

In the absence of such prejudice, this Court recently sustained a widow's action under the Louisiana workmen's compensation statute for the death of her husband, a seaman. Beadle v. Massachusetts Bonding & Ins. Co., 87 So. 2d 339.

In the course of that opinion, we had occasion to discuss fairly extensively the course of the jurisprudence

since the ill-starred *Jensen* doctrine.[2] It was our conclusion that, allowing for the presumption of constitutionality attaching to enactments of State legislatures, the federal maritime and the State compensation remedies "may overlap; and when they do, as in the present instance, the employee's choice of either will be upheld," 87 So. 2d 343.

We have been reenforced in our belief that these conclusions are correct by the scholarly and comprehensive summary of the jurisprudence found in the authoritative treatise by Dean Larson, Workmen's Compensation Law, Sections 89.10 through 89.60, Volume 2, pp. 408-420 (hereinafter cited as **LARSON**). Dean Larson summarizes the present status of the law as having evolved after passing through five phases:

First, unqualified federal pre-eminence and pre-emption, as initiated and exemplified by the *Jensen* decision;

Second, an exception permitting State remedies for injuries arising in maritime employments primarily local in character, as exemplified by Grant-Smith-Porter Ship Co. v. Rhode, 257 U. S. 469, 42 Sup. Ct. 157, 25 ALR 1008 (1922);

Third, the Longshoremen's Act phase, during which longshoremen and other harbor workers injured on navi-

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[2] The **Jensen** decision was criticized by virtually all commentators and many subsequent decisions. See: both the concurring opinion of Mr. Justice Frankfurter, and the dissenting opinion of Chief Justice Stone in Davis case; 2 Larson, Workmen's Compensation Law 409-410; summary of criticisms in Swan v. Baton Rouge Transportation Co., 197 So. 191, particularly at 193, wherein this court reluctantly followed the case, referring to the "harsh and unsatisfactory results caused by the decision in the Jensen case", 17 So. 194.

gable waters were relegated to the Longshoremen's Act, although if injured on land or by a blow from the land they were permitted to retain their State Compensation remedy, as exemplified by a case arising in Louisiana and permitting the State remedy, T. Smith & Sons, Inc. v. Taylor, 276 U. S. 179, 48 S. Ct. 228;

Fourth, the "twilight zone" phase initiated by the *Davis* case, where the employee's choice of either state or federal remedy would be sustained in borderline cases; and,

Fifth, the present stage of concurrent jurisdiction exercised by both State and federal tribunals, each jurisdiction deciding for itself whether it shall apply its own law, such determination being relatively final.

As did this court in its Beadle decision, Dean Larson's conclusion that there is concurrent jurisdiction for both State and federal remedites was reached on the basis of the United States Supreme Court's ruling in Bethlehem Steel Co. v. Moore, 333 U. S. 874, 69 S. Ct. 233 (1948) (affirming 323 Mass. 462, 82 N. E. 2d 748) and Baskin v. Industrial Acc. Comm., 338 U. S. 854, 70 So. Ct. 99 (1949) (reversing 89 Cal. App. 2d 632, 201 P. 2d 549).

Both the *Moore* and *Baskin* cases involved workers hurt while on board and repairing a completed vessel on navigable waters; it having formerly been firmly decided that such injuries were exclusively within the federal maritime jurisdiction, and were beyond the protection of the State compensation remedy, John Baizley Iron Works v. Soan, 281 U. S. 222, 50 St. 306. Robbins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449, 45 S. Ct. 157, see

Messel v. Foundation Co., 274 U. S. 427, 47 S. Ct. 695—no less firmly than the similar decisions relating to other harbor workers in the category of "longshoremen" such as the present plaintiff. (See 2 LARSON 415).

Nevertheless, the Supreme Court affirmed the State court's award of State compensation in the *Moore* case; and reversed the California commission's denial of State compensation in the Baskin case to such an employee, which had been based upon the alleged exclusiveness of the federal remedy provided by the Longshoremen's Act.[4]

We think the rulings in those cases to be determinative in the present. Louisiana has endeavored to extend the protection of her compensation act to longshoremen such as plaintiff by providing as among the occupations specifically covered by the act, the "loading and unloading of cargoes of vessels," LSA-R. S. 23:1035. This solemn enactment of our legislature is presumed to be constitutional. Under the *Davis*, *Moore*, and *Baskin* cases, the election of this workingman injured in Louisiana to apply in the courts of Louisiana for a remedy provided for him by the legislature of Louisiana cannot be rejected, unless it should work material prejudice to the general maritime law.

And how can the sustaining of plaintiff's election work material prejudice or disrupt the uniformity of the general maritime law?

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[4] In a subsequent **Baskin** case, the Supreme Court specifically affirmed the award of State compensation despite the attempted defense that the employee's acceptance of payments under the Longshoremen's Act (without an award) had amounted to an election to come under the federal, rather than State, remedy, Kaiser Co., Inc. v. Baskin, 340 U. S. 886, 71 S. Ct. 208; affirming 97 Cal. App. (2d) 632, 201 p. (2d) 549.

Had this same longshoreman been injured in the same manner, in the course of his employment with the same employer, having reported for work the same day, his employer subjected to the same risks and paying the same insurance premiums, plaintiff would undoubtedly have been entitled to recovery under the Louisiana compensation law, even before the *Davis* case, had he been injured on land or on the gangplank a few feet distant from the present accident aboard ship, as specifically held in a case arising in Louisiana, T. Smith & Sons, Inc. v. Taylor, 276 U. S. 179, 48 S. Ct. 228 (1930).

That the amount of compensation subsistence payable might vary somewhat from State to State affords no more reason for declaring these variations so disruptive of the necessary uniformity of the federal maritime law as to be unconstitutional than does the fact that the daily rate of "maintenance" payable to injured seamen varies greatly (i. e., from $2.50 to $8.00 per day) from port to port and jurisdiction to jurisdiction in the various States of the federal union (see 2 Norris, *Law of Seamen*, 235-237, Section 603, "Amount" of maintenance and cure), or that some harbor workers in the *Davis*, *Moore*, and *Baskin* situations will recover under the federal remedy and others by application to the States.

Almost all the cases cited to us by defendant-appellees concern cases decided in the various phases of the jurisprudence preceding the present which is that governed by the *Davis*, *Moore* and *Baskin* decisions. But able counsel relies with some confidence on some dicta in Pennsylvania R. Co. v. O'Rourke, 344 U. S. 334, 73 S. Ct. 302, which dicta is indeed somewhat favorable to its position.

However, the court therein was addressing itself exclusively to the question of whether an injured brakeman's remedy was under the federal Employers' Liability Act, 45 USCA, Par. 51, et seq., or whether it was under the federal Longshoremen's Act, since O'Rourke, a railroad employee, had been injured while aboard a car float. The U. S. Supreme Court, over the dissent of four members, decided that of the two federal remedies, the Longshoremen's Act provided the remedy.

But the *O'Rourke* case constituted simply an exercise in statutory construction to determine which of two federal remedies applied in the federal forum. For instance, had the employee in the Davis case brought suit in the federal forum seeing a federal remedy, he would have been similarly relegated to the Longshoremen's Act, as a structural steel worker killed on a barge in the navigable waters.

The court in *O'Rourke* was not concerned with the constitutionality of an attempted exercise of its powers by a State to afford a remedy to working people injured in connection with amphibious employments. Under the *Davis*, *Moore*, and *Baskin* cases, O'Rourke's choice of a State compensation remedy would apparently have been sustained as against a contention that the federal Longshoremen's Act provided the exclusive remedy, despite the fact that he like those plaintiffs (and also the present plaintiff) was a harbor worker injured on the navigable waters of the United States.

Lastly, defendant-appellee argues that Congress, by enacting the Longshoremen's and Harbor Workers' Act pursuant to its constitutional power over commerce, has

preempted this field to the exclusion of the States. But Congress in enacting the statute specifically provided that compensation should be payable under that Act only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law", 33 USCA 903.

Admitting that at the time of enactment of the Longshoremen's Act, the judicial creation of the *Jensen* doctrine had created a bar to the remedy Louisiana attempted to provide, and which Congress was willing to afford Louisiana workers in their own courts, it is plain that under the *Davis, Moore* and *Baskin* cases such artificial barrier no longer exists when the employee has elected to pursue his State compensation remedy instead of a federal maritime remedy.

We think very appropriate Dean Larson's concluding remarks in his summary of the present jurisprudence, found at 2 LARSON 419:

> "While the Supreme Court's handling of this problem has been criticized as confusing and contradictory, the working rule that emerges is perhaps as practical as any rule could be that attempts to sort out the intricately intertwined activities of amphibious workers with a minimum of litigation. After all, a slight error in respect to the extent of maritime power in a particular case will neither ruin an employer nor shatter the federal constitution if it merely gives the employee the benefit of the act which happens to be the more favorable to him. The Supreme Court's lack of enthusiasm for investigating the constitutional minutiae of each

attempt to classify a borderline water front worker no doubt stems partly from a general feeling that all the trouble is traceable to the artificial doctrine of the *Jensen* case, without which all this would have been avoided. If amphibious workers had simply remained under their respective state acts, just like their neighbors who work exclusively on shore, no one could have dreamed of suggesting that the result would be unfair to employer or employee, or inconsistent with the spirit and objectives of compensation legislation. If, then, approximately the same result comes about as a consequence of the *Davis*, *Moore* and *Baskin* cases, while it may occasion concern to students of constitutional law, there is no cause for consternation in compensation circles."

For the above and foregoing reasons, the judgment of the District Court dismissing this compensation suit is reversed, and the matter is remanded for further proceedings according to law.

REVERSED AND REMANDED.

APPENDIX "B"

SUPREME COURT OF LOUISIANA
New Orleans

BY PONDER, J.:

Lincoln Richard

v.

Lake Charles Stevedores, Inc., et al.

October 8, 1957

No. 43,634

In re: Lake Charles Stevedores, Inc., and The Travelers Insurance Co. Applying for certiorari or writ of review to the Court of Appeal, First Circuit, Parish of Calcasieu.

Writs refused. Judgment correct.

/s/ ALP
/s/ JBF—
/s/ JBH
/s/ EHMcC
/s/ WBH
/s/ JDS

A TRUE COPY
Clerk's Office, New Orleans
October 8, 1957
/s/ Harold A. Moise, Jr.,

Harold A. Moise, Jr.,
Deputy Clerk
[Seal]

APPENDIX "C"

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

FRED SULLIVAN,
Plaintiff-Appellant,

vs.

TRAVELERS INSURANCE COMPANY, ET AL.,
Defendant-Appellee.

Appeal from the Fourteenth Judicial District Court,
Calcasieu Parish; Hon. Preston L. Savoy,
District Judge, Presiding.

TATE, Judge.

This workmen's compensation suit by a longshoreman injured while working on a vessel in navigable waters involves the same legal question as that involved in Richard v. Lake Charles Stevedores, Inc., decided by us this day, ____ So. 2d. ____. For the reasons assigned in that case, the District Court judgment herein sustaining defendant's exceptions and dismissing plaintiff's action is reversed, and this suit is remanded for further proceedings according to law.

REVERSED AND REMANDED.

APPENDIX "D"

SUPREME COURT OF LOUISIANA
New Orleans

BY PONDER, J.:

Fred Sullivan

v.

Lake Charles Stevedores, Inc. and The Travelers Insurance Co.

October 8, 1957

No. 43,635

In re: Lake Charles Stevedores, Inc. and The Travelers Insurance Company applying for certiorari or writ of review to the Court of Appeal, First Circuit, Parish of Calcasieu.

Writ refused. Judgment Correct.

/s/ ALP
/s/ JBF
/s/ JBH
/s/ EHMcC
/s/ WBH
/s/ JDS

INDEX

	Page
ARGUMENT	1
CONCLUSION	8
CERTIFICATE	9

CITATIONS

Cases:

Allisot v. Federal Shipbuilding & Drydock Co., 73 A. 2d 153	4
Baskin v. Industrial Accident Commission, 338 U. S. 854, 70 S. Ct. 99, 94 L. Ed. 523, reversing 89 Cal. App. 2d 632, 201 P. 2d 543	4
Behrle v. London Guarantee & Acc. Co., Ltd., 68 A. 2d 63 (R. I.) certiorari denied, 339 U. S. 928, 70 S. Ct. 627, 94 L. Ed. 1349	4
Bethlehem Steel Co. v. Moore, 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. 417, affirming Moore's case, 323 Mass. 162, 80 N. E. 2d 478	4
Commissioner of Tax & Finance v. Oceanic Serv. Corp., 276 App. Div. 725, 97 N.Y.S. 2d 401	4
Davis v. Dept. of Labor, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246	4
Dunleavy v. Tietjen & Lang Dry Docks, 85 A. 2d 343	4, 5
Eldredge v. Weidler, 274 App. Div. 138, 81 N.Y.S. 2d 58	4, 6
Kaiser Company, Inc., v. Baskin, 340 U. S. 886, 71 S. Ct. 208, 95 L. Ed. 643, affirming 97 Cal. App. 2d 257, 217 P. 2d 733	4

Cases—(Continued):

	Page
Maryland Cas. Co. v. Toups, 172 F. 2d 542, certiorari denied, 336 U. S. 967, 69 S. Ct. 937, 93 L. Ed. 1118	4
Minnie v. Port Huron Terminal Company, 55 S. Ct. 884, 295 U. S. 647	5
T. Smith & Son v. Taylor, 276 U. S. 179, 48 S. Ct. 228	5
Southern Pac. Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086	5
Statutes:	
Title 33, U.S.C.A., Section 903	3
West's Louisiana Revised Statutes: Chapter 23, Section 1035	1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. _____

LAKE CHARLES STEVEDORES, INC., and
THE TRAVELERS INSURANCE COMPANY,
Petitioners,

versus

LINCOLN RICHARD,
Respondent.

ALSO

LAKE CHARLES STEVEDORES, INC., and
THE TRAVELERS INSURANCE COMPANY,
Petitioners,

versus

FRED SULLIVAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ARGUMENT.

In order for petitioners to prevail herein portions of the Louisiana Workmen's Compensation Statute must be declared unconstitutional. By its terms, that statute affords a remedy to respondents. We quote:

West's La. Rev. St. 23:1035:

"The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses and occupations:

"The operation, construction, repairs, removal, maintenance and demolition of . . . vessels, boats, and other water crafts. . . . Rigging or coaling of vessels, or loading or unloading of cargoes of vessels. . . ."

Petitioners contend that the state statute may at times constitutionally apply to repairers of vessels for example but not, under otherwise indistinguishable circumstances, to those who load or unload vessels. The employment of the one is more maritime in nature than the other, they say. Suppose that an explosion occurs aboard a vessel moored to a Lake Charles dock killing an employee engaged in unloading cargo and another (neither being a member of the crew) engaged in repairing a hole in the hull. The dependents of each seek the state remedy. If petitioners are correct, that portion of the section of the state statute referring to repairs of vessels would be held constitutional, that portion referring to loading and unloading, unconstitutional. And for such a result petitioners rely upon Section 2 of Article 3 of the Constitution of the United States extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

Before there were cargoes to load or unload, ship crews repaired their vessels. The repair and upkeep of

vessels is "more" maritime, more essential and closely related to navigation—to "admiralty"—than is the loading and unloading of those vessels.

We turn to the Longshoremen and Harbor Worker's Compensation Act. We observe, first, that the **only** time the terms "longshoremen" and "harbor workers" are used in the Act is in the first section thereof, reading: "This chapter may be cited as the Longshoremen's and Harbor Workers' Compensation Act." The third section of the Act, Title 33 of U.S.C.A., sec. 903, is unequivocably expressive of congressional intent apropos applicability of state workmen's compensation laws wherever constitutionally permissible, reading, in part:

> "Sec. 903 **Coverage.** (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) **and** IF RECOVERY FOR THE DISABILITY OR DEATH THROUGH WORKMEN'S COMPENSATION PROCEEDINGS MAY NOT BE VALIDLY PROVIDED BY STATE LAW. . . ." (Emphasis added).

Extensive argument in support of respondents' position herein would be superfluous in view of the admirably and concisely reasoned opinion of Judge Tate of the Louisiana Court of Appeal, First Circuit, in the Lincoln Richard case (R. 32 to 40). We rest our case upon that opinion.

The authorities upon which we rely are:

Davis v. Dept. of Labor, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246 (1942);

Bethlehem Steel Co. v. Moore, 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. 417 (1948), affirming *Moore's* case, 323 Mass. 162, 80 N. E. 2d 478 (1948);

Baskin v. Industrial Accident Commission, 338 U. S. 854, 70 S. Ct. 99, 94 L. Ed. 523 (1949), reversing 89 Cal. App. 2d 632, 201 P. 2d 549 (1949);

Kaiser Company, Inc., v. Baskin, 340 U. S. 886, 71 S. Ct. 208, 95 L. Ed. 643 (1950), affirming 97 Cal. App. 2d 257, 217 P. 2d 733 (1950).

Other authorities, also pertinent, include:

Behrle v. London Guarantee & Acc. Co., Ltd., 68 A. 2d 63 (R. I.) certiorari denied, 339 U. S. 928, 70 S. Ct. 627, 94 L. Ed. 1349 (1950);

Allisot v. Federal Shipbuilding & Drydock Co., 73 A. 2d 153 (N. J. 1950);

Dunleavy v. Tietjen & Lang Dry Docks, 85 A. 2d 343 (1951);

Commissioner of Tax & Finance v. Oceanic Serv. Corp., 276 App. Div. 725, 97 N.Y.S. 2d 401 (1950);

Eldredge v. Weidler, 274 App. Div. 138, 81 N. Y. S. 2d 58 (1948);

Maryland Cas. Co. v. Toups, 172 F. 2d 542 (5th Cir. 1949), certiorari denied, 336 U. S. 967, 69 S. Ct. 937, 93 L. Ed. 1118 (1949).

As stated by Judge Drewen in the *Dunleavy* decision, at 85 A. 2d 351: "The ruling opinion in the Davis case leaves no doubt that if the federal jurisdiction had had first cognizance of the claim and proceeded to final award, it would have been upheld."

We turn now to the cases cited by petitioners. Foremost among these are *Minnie v. Port Huron Terminal Company*, 55 S. Ct. 884, 295 U. S. 647 (decided in 1935) and *T. Smith & Son v. Taylor*, 276 U. S. 179, 48 S. Ct. 228 (decided in 1928).

So far as the theoretic premise espoused by petitioners is concerned, we readily concede that it is supported by those and other cases of comparable or earlier vintage. Even so, it does not follow that those cases—even if there were no others—warrant the granting of a writ of certiorari in the instant situation.

However, the essence and core of our position is that the holdings in *Davis*, *Moore* and *Baskin* represent a radical departure from the older decisions, and require in the instant matter a result different from that reached in those older cases. Petitioners say no. **Therein lies the simple crux of the issue between petitioners and respondents.**

Incidentally, in their petition for a writ, petitioners fail even to mention (except where the citation appears in a quotation from another case) the decision in *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086. The reason would appear to be that this particular decision, *eo nomine*, has been largely discredited. But it is the full re-adoption of the *Jensen* doctrine that petitioners implicitly urge.

We do not feel that a review here of the facts in *Davis*, *Moore* and *Baskin* is indicated. In each the employee was injured or killed while performing work in the course of his maritime employment on board a vessel afloat in navigable waters. All lived on shore and may be described as waterfront employees.

Petitioners say that an alchemy results if a worker is a longshoreman—as opposed to a harbor worker. Extensive citations of cases defining those terms are contained in *West's Words and Phrases*.

Petitioners, perforcedly, at least, point to the general language of the United States Constitution as rendering this matter an "open daylight" situation clearly requiring a reversal of the Louisiana courts. What then of the provision of the Longshoremen and Harbor Worker's Compensation Act excluding from the coverage thereof injury or death to "any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." It was in compliance with petitioners' urgent desire that it was stipulated that the vessels upon which respondents were injured exceeded eighteen tons. In *Eldredge v. Weidler*, 81 N. Y. S. 2d 58, 274 App. Div. 138 (1948) recovery was sought under the New York Workmen's Compensation Act for the death of an employee accidentally drowned. It was held a sufficient reason to allow recovery that no showing had been made that the vessel to be served by the deceased exceeded eighteen tons. Congress might have decided upon any other tonnage. Is a fundamental earth-shaking principle involved if recovery by an injured waterfront employee depends upon whether he was injured on a vessel of seventeen rather than of nineteen tons?

If petitioners' position were upheld it would mean that upon the filing of a suit for workmen's compensation by a longshoreman or harbor worker for injuries sustained on a vessel, the trial court would first be required to determine whether he could successfully urge a claim under the Longshoremen and Harbor Worker's Compensation Act. If the court were of opinion that the worker could recover under the federal act, his suit would be dismissed. If the court were uncertain on that score, the suit would be entertained. If the waterfront worker alleged that he was a harbor worker, he would be "in court", but not if he alleged that he was a longshoreman.

The trial court's determination of that issue (possibility of success under the federal act) would have to be based upon an examination of the petition seeking workmen's compensation, without the benefit of evidentiary facts. It usually would not know whether the worker had ever been on a ship prior to the accident, the type of the vessel, whether it had motive power, was a ship under construction or a commissioned ship under repair, was engaged in commerce, was moored or secured to a dock or to land and, if so, how, and so on. The worker's petition seeking workmen's compensation might factually allege that he had been sent on board a vessel to unload it, but sustained injuries after being pressed into service to assist in making emergency repairs to the vessel. Or the situation might be that he was injured after having completed one type of activity but before having actually begun a different type to which he had been assigned.

Petitioners say that the rule of *Minnie* and *Jensen* is and should be good law "in clear cases". What they do not seem to realize is that the *sine qua non* of that rule is

the requirement that a determination be made of what is clear in situations in which clarity does not exist. To apply it in a "clear" case means that in innumerable instances of injury to waterfront workers involving inextricably interwoven elements both "of the land" and "of the sea" the trier of fact will be faced with the impossible task of deciding upon which side of the mystical line each individual case falls. That was the Gordian knot severed by *Davis*.

But in any event, the present matter **IS** no "clearer", to say the least, than the fact situations presented in *Davis*, *Moore*, and *Baskin*. Plainly, the choice of the state remedy made by respondents must be sanctioned.

The granting of a writ in these cases would constitute a long backward step. The ills of *Jensen* would be raised from the unmourned dead. The spawning of more of their ilk would follow.

CONCLUSION.

We submit that the petition for certiorari in these cases should be refused.

Respectfully submitted,

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CERTIFICATE.

I certify that a copy of the foregoing brief has been delivered to John A. Hickman, Esq., 506 Weber Building, Lake Charles, Louisiana, counsel for petitioners, Lake Charles Stevedores, Inc., and The Travelers Insurance Company.

s RUSSELL T. TRITICO

RUSSELL T. TRITICO,
Counsel for Respondents.